STATUTES AND REGULATIONS

1954 Internal Revenue Code

BEQUESTS TO SURVIVING SPOUSE

Section 2056. Bequests, etc., to Surviving Spouse

(a) ALLOWANCE OF MARITAL DEDUCTION.— For purposes of the tax imposed by Section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) LIMITATION IN THE CASE OF LIFE ESTATE OR OTHER TERMINABLE INTEREST.—

(1) GENERAL RULE.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest:

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagaphs (A) and (B)).

STAY OF PROCEEDINGS

1954 Internal Revenue Code

26 U.S.C. 7422(e).

(e) STAY OF PROCEEDINGS.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has

been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

TREASURY DEPARTMENT REGULATIONS

Treasury Decision 6296; 1958-2 C. B. 563

Section 20.2056 (b)-1. Marital Deduction: Limitation in Case of Life Estate or Other "Terminable Interest."

(a) IN GENERAL.—Section 2056(b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests", passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. However, the fact that an interest in property passing to a decedent's surviving spouse is a "terminable interest" makes it non-deductible only (1) under the circumstances described in paragraph (c) of this section, and (2) if it does not come within one of the exceptions referred to in paragraph (d) of this section.

(b) "TERMINABLE INTERESTS".—A "terminable interest" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or a term for years, is not a terminable interest.

(c) NONDEDUCTIBLE TERMINABLE INTERESTS.—(1) A property interest which constitutes a ter-

minable interest, as defined in paragraph (b) of this section, is nondeductible if:

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

(2) Even though a property interest which constitutes a terminable interest is not nondeductible by reason of the rules stated in subparagraph (1) of this paragraph, such an interest is nondeductible if:

(i) The decedent has directed his executor or a trustee to acquire such an interest for the decedent's surviving spouse (see further paragraph (f) of this section), or

(ii) Such an interest passing the decedent's surviving spouse may be satisfied out of a group of assets which includes a nondeductible interest (see further § 20.2056 (b)-2): In this case, however, full nondeductibility may not result.

(d) EXCEPTIONS.—A property interest passing to a decedent's surviving spouse is deductible (if it is not otherwise disqualified under § 20.2056 (a)-2) even though it is a terminable interest, and even though an interest therein passed from the decedent to another person, if it is a terminable interest only because:

(1) It is conditioned on the spouse's surviving for a limited period, in the manner described in § 20.2056 (b)-3;

(2) It is a right to income for life with a general power of appointment, meeting the requirements set forth in § 20.2056 (b)-5; or

(3) It consists of life insurance or annuity payments held by the insurer with a general power of appointment in the spouse, meeting the requirements set forth in § 20,2056 (b)-6.

APPLICABLE MISSOURI STATUTES

Missouri Revised Statutes

DEVOLUTION OF ESTATE AT DEATH

Chapter 473.260. Devolution of Estate at Death.

When a person dies, his real and personal property, except exempt property, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it is subject to the possession of the executor or administrator and to the election of the surviving spouse and is chargeable with the expenses of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this law. (L. 1955, p. 385, § 105).

DISTRIBUTION, WHEN REQUIRED

Chapter 473.610. Distribution, When Required.

Executors and administrators shall not be compelled to make distribution or pay legacies until six months after the date of the letters, unless the legacies specified would be perishable, or subject to injury if retained six months. (L. 1955, p. 385, § 215).

COURT TO CONFORM TO DIRECTIONS OF WILL

Chapter 474.430. Court to Conform to Directions of Will.

All courts and others concerned in the execution of last wills shall have due regard to the directions of the will.

and the true intent and meaning of the testator, in all matters brought before them (L. 1955, p. 385, § 272).

DEVISE DEEMED TO CONVEY FEE SIMPLE, WHEN

Chapter 474.480. Devise Deemed to Convey Fee Simple, When.

In all devises of lands or other estate in this state, in which the words "heirs and assigns", or "heirs and assigns forever", are omitted, and no expressions are contained in the will whereby it appears that the devise was intended to convey an estate for life only, and no further devise is made of the devised premises, to take effect after the death of the devisee to whom the same is given, it shall be understood to be the intention of the testator thereby to devise an absolute estate in the same, and the devise conveys an estate in fee simple to the devisee, for all of the devised premises. (L. 1955, p. 385 § 277).

JUDGMENT

(Filed in United States Court on December 14, 1962.)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MAUDE H. LAMAR, Personally and as Extrx. of Frederick C. Lamar, Plaintiff, vs. EDWIN O. BOOKWALTER, District Director of Internal Revenue, Defendant.	Civil No. 13,113

The Court having considered the evidence and the arguments of counsel, and having entered its Findings of

Fact and Conclusions of Law herein, it is in conformity therewith Ordered and Adjudged:

1. That the plaintiff have judgment against the defendant for the principal sum of $70,149.40, plus interest thereon at 6% from September 19, 1960, according to law;

2. That the complaint of the intervenor, the United States of America, be dismissed with prejudice;

3. In accordance with Section 2053(a)(2) of the Internal Revenue Code of 1954 and Treasury Regulations on Estate Tax (1954 Code), Section 20. 2053-3(c)(2), that the plaintiff be allowed as an estate tax deduction reasonable attorneys' fees considering the total amount of the recovery awarded to the plaintiff herein, providing further, however, that the adjusted gross estate of $604,817.63, agreed upon by the parties under the Court's Findings, shall be reduced in an amount equal to such allowance, and that such deduction shall be reduced in an amount equal to the corresponding decrease in the allowable marital deduction; and

4. That the plaintiff have her costs of this action as permitted by law.

Further, the Court hereby certifies that, in performing his official duties involved herein, the defendant had probable cause.

Dated this 14th day of December, 1962

R. M. Duncan

United States District Judge

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

(Filed in United States District Court on December 3, 1962.)

This action was instituted by the executrix to recover the sum of $70,456.89 plus interest, alleged to have been overpaid as Federal Estate Taxes by the estate of Frederick C. Lamar. The facts are not in dispute, and the question for determination by the court is one of law; whether or not the plaintiff, as deceased's widow, under the terms of his will was entitled to a marital deduction of 50%, or whether her interest was a terminable one under § 2056 Internal Revenue Code 1954, 26 U.S.C.A. 1954 Ed. § 2056.

This controversy arises under § 361 Revenue Act of 1948: c. 168, 62 Stat. 110, which amended the Internal Revenue Code of 1939 to provide for a marital deduction. This section became § 812(e) of the Internal Revenue Code 1939, and is presently found in § 2056 Internal Revenue Code of 1954.

Prior to the enactment of this section, there was no provision in the tax laws allowing such marital deduction. The intent of Congress, as revealed in S. Rep. No. 1013, 80th Cong. 2d Sess. U. S. Code Cong. Serv. 1948, Vol. II, page 1223 which accompanied the Bill, clearly points out that the basic purpose of the marital deduction was to equalize the tax situation between community and non-community property states. See *Poe v. Seaborn*, 282 U.S. 101; *Commissioner v. Ellis' Estate*, 252 F.2d 109 (C.A. 3d).

The enactment of this statute was the culmination of more than ten years of discussion and consideration by the tax writing committee of the Congress. The question first

arose in the middle '30s when the Treasury Department recommended that the tax benefits derived by husband and wife in the community property states be abolished, primarily for the purpose of obtaining additional revenue. This, of course, resulted in a great storm of protest from the twelve community property states, particularly Texas and California, where the wealthy taxpayers were enjoying preferential advantages as compared to the taxpayers of the rest of the country. A hearing was held before the Committee and the recommendation was not accepted or approved and written into the succeeding tax bill.

As Federal taxes continued to increase rapidly, the taxpayers in the non-community property states complained bitterly of inequality and demanded some relief for themselves. As a matter of fact, several states including Oklahoma and Michigan and others, enacted statutes to give their citizens relief. This was necessary because some of their wealthy citizens were moving into the community property states so that they might enjoy the tax benefits.

This controversy continued until finally it resulted in the enactment of the present bill which authorized joint tax returns between husband and wife, and provided for the marital deduction. However, in § 2056 Internal Revenue Code of 1954, the Congress has placed certain restrictions upon the transfer of property for the purpose of allowance of the marital deduction, including subsection (b) (1), which provides:

> "Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest * * *."

And (b) (3) which provides:

> "For purposes of this section an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if * * *.
>
> (A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse or only if it occurs in the case of either such event; and
>
> (B) such termination or failure does not in fact occur."

In view of the clear and unequivocal Congressional expression that the purpose of the statute was to equalize the burden of Federal taxation between community and non-community property states, certainly the statute should be construed so as to effectuate that purpose, if it can be consistently done.

Frederick C. Lamar died testate on January 1, 1958, a resident of Jackson County, Missouri. He was survived by his widow, the plaintiff, a son, a daughter-in-law and a number of grandchildren. His will was admitted to probate on January 8, 1958, and his widow was duly appointed executrix by the Probate Court of Jackson County, Missouri.

After making certain specific bequests to his heirs, he provided in Article X of his will:

> "I give, devise and bequeath all of the rest, residue and remainder of my property and estate, of whatsoever character and description, real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife,

Maude H. Lamar, to have and to hold as her property *absolutely* (Emphasis supplied).

In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall not survive me or in the event she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, *or shall not survive the administration of my estate*, then and in that event, I give, devise and bequeath and dispose of said residue and remainder of my property to the following persons, and in the manner as follows: * * *". (Emphasis supplied).

The testator then made provision for the disposition of the residue of his estate to his son, his daughter-in-law and his grandchildren going into considerable detail as to how the estate should be disposed of, and to whom, all of which is not important to a determination of the issues here.

The estate consisted entirely of personal property, the bulk of which was stocks, bonds, securities and some mortgages. According to the records of the Probate Court, there were no debts except some minor current accounts and expenses incident to his death and the cost of administration.

The decedent's widow did not predecease him, and survived the administration of his estate.

Subsequently there were some adjustments in the gross estate resulting from an audit, which reflected an increase in the value of certain stocks and securities. The marital deduction was also disallowed to the extent that it included the value of the assets within the residuary estate amounting to $223,907.31.

These adjustments led to an assessment of a tax deficiency against the estate of $70,456.89, which included

MICRO CARD

TRADE MARK ®

22

CD 444

MATTHEW BENDER & COMPANY

MB

6-64

microcard

principal and interest. The amount is not in controversy, and was paid by the executrix to the District Director on September 19, 1960, and on the same day a claim for refund was filed with the Commissioner, which was thereafter disallowed. In due time this action was instituted.

In disallowing the deduction the District Director contends that the provision of the will relative to the survival by the widow of the administration of the estate created a non-deductible terminable interest. Plaintiff contends that the interest created is absolute and indefeasible and vested immediately upon the death of the testator. Consequently it was not terminable as defined by the Revenue Code.

It is recognized by the parties that the question of whether or not the interest of the plaintiff was a terminable one is to be determined by the law of Missouri. No Missouri cases have been cited and we have not been able to find any determining whether or not such interest as we are dealing with here vested at the time of testator's death or at the time of distribution. Nor has a like question of Missouri law been before the Federal courts.

However, the question has been considered by United States District Courts in other states where the language in the will was almost exactly like that in Lamar's will. Because the decisions in those cases were based upon state law, there is no unanimity of opinion.

In *Robertson* v. *U. S.*, 199 F.S. 78 (N.D. Ala. 1961), the District Court held that language in a will similar to that in the present case, under Alabama law, created a terminable interest and was not deductible.

In California in several cases it has been held that such language creates a terminable interest. See *Farrell* v. *U. S.*, 198 F.S. 401 (S.D. Cal. 1961).

In Montana in *Steele* v. *U. S.*, 146 F.S. 316 (D. Mont. 1956), the United States District Court held that a determination by a state court of language in a will comparable to that in Lamar's will, created an interest which vested at the time of decedent's death, was binding upon it and held that the wife was entitled to her marital deduction.

A similar situation appeared in Oklahoma in *Mappes et al.* v. *U. S.*, in an opinion by Judge Rizley, dated May 18, 1962 (not officially reported), it was held that a determination by the state probate court where testator provided in his will that:

> "I give, devise and bequeath to my wife, Lottie Mappes, if living at the time of my death, all of the remainder of my property, real, personal and mixed, wherever it may be situated."

In paragraph 3 he further provided that:

> "In the event my wife should predecease me, or should die before my estate has been administered, then, in that event, I give, devise and bequeath to my sons, * * *."

created a fee simple title in the wife at the time of her husband's death, was binding upon the Federal court and that the widow was entitled to a marital deduction. In arriving at its conclusion, the court relied upon *Brodrick* v. *Gore*, 224 F.2d 892 (C.A. 10th, 1955).

None of the above cases are of much help to us here because in each case there had been a prior determination by the state court of the time of vesting and nature of the interest, and the Federal court held it was bound by that determination. A case which more closely parallels our case is *Smith* v. *U. S.*, 158 F.S. 344 (D. Colo. 1957), where the will stated:

"I devise and bequeath to my wife, Hellen L. Smith, all the rest, residue and remainder of my estate of whatsoever character and wheresoever located, including all lapsed legacies and devises, to be her absolute property.

In the event my wife should pre-decease me, or surviving me, die before distribution to her of the bequest herein provided for her, then and in that event I direct that the bequest to her shall lapse and become a part of the rest and residue of my estate * * *."

The question for determination was the same as here, plaintiff contending that her interest vested absolutely and the Government contending that it was a "terminable interest" and not deductible. In arriving at its conclusion, the court accepted the contention of plaintiffs that:

"The provisions of the second paragraph (of the will), and particularly the language last above quoted, are so indefinite, uncertain, and ambiguous as to meaning, and in such hopeless conflict with the first paragraph of Article VIII of the will, as well as Article VII thereof as to render said second paragraph void and of no effect",

and held that the widow's interest qualified for the deduction. The court did not discuss the statutory law of wills and probate of Colorado.

So far as Federal Decisions are concerned, we come to the only decided case on the exact question in our own Eighth Circuit, *Kasper* v. *Kellar*, 217 F.2d 744 (C.A. 8th, 1954), decision on remand 138 F.S. 738 (W.D. S.D. 1956). The subject of the controversy in this case was the language in Kellar's will:

"I give and bequeath to my wife, Floy B. Kellar, if living at the time of the distribution of my estate, the sum of One Hundred Thousand Dollars ($100,000.

in money or at her option in securities to be selected by her, at their market value; if she then be dead this legacy to lapse and become a part of my residuary estate. It is my will and I do so direct that this legacy shall be paid in full prior to the payment of any other legacy, bequest or devise."

The question of whether, under this language, the interest of the widow was a terminable one and not subject to deduction, was before the late Judge A. Lee Wyman, who upheld the contention of the executors that the actual intention of the testator as expressed in the will was sufficient to bring the case within the exception stated in § 812(e)(1) of the Internal Revenue Code of 1939.

The widow survived the decedent and the administration of the estate which was closed and distribution of the assets made by the executor within six months following decedent's death. The widow claimed her marital deduction and paid the tax upon the remainder, and upon disallowance by the Commissioner, the amount demanded was paid and suit brought for refund.

In an unpublished opinion, Judge Wyman held that the widow, having survived the six months period following her husband's death, was entitled to the marital deduction under § 812(e)(1)(d), Judge Wyman stated:

"We are not concerned with what might have happened. Chambers Kellar bequeathed his property to his wife if she was alive when his estate was probated and distributed, and she was alive when his estate was probated and distributed, and that is all that is necessary, since it was within *six months subsequent to his death*." (Emphasis supplied).

On appeal the Court of Appeals reversed and remanded:

"* * * for a determination, on the present record or otherwise, as the court may deem appropriate, of whether, under the wills-and-property law of South Dakota, the language used and the intention and the circumstances involved would be regarded as having had the legal effect of vesting and making indefeasible in the widow, as of the time of the testator's death, the property devised and bequeathed to her."

In the appellate court the estate asked the court to hold that in addition to the contention sustained by Judge Wyman, that it also hold under South Dakota law that the words used in the will by the testator, "if living at the time of the distribution of my estate" mean "if living at the time of my death". Concerning that request, the court cited the cases for and against the theory, where it said:

"There is nothing before us that would in any way enable us to do more than nakedly guess as to which of the two general lines of conflicting decisions the State of South Dakota would probably follow. We will not ordinarily decide questions which have not been passed upon by the trial court, except where they are necessarily determinative of the result of the litigation as matters of controlling and established law. And on the question of resolving what local law is, which is unclear or unsettled, we have particularly emphasized, as our many decisions indicate, that we desire and will heavily rely upon the considered appraisal of a District Judge as to what the local law of his jurisdiction is.

This is as it should be, for factors of evaluation and judgment on unsettled questions will naturally be present at the local level, which are not available to us, such as unreported trial-court decisions, percolating judicial trends, accepted legal climate, and familiarity with prevailing professional thought and temper."

On remanding the case for hearing before Judge Mickelson upon the original record and the testimony of five out-

standing South Dakota lawyers, the question was whether or not, under South Dakota law, the language used in the will created an indefeasible interest in the widow as of the time of decedent's death. This evidence was heard pursuant to stipulation of the parties. Four of the witnesses testifying for plaintiff "believed unequivocally"—"That the title to the property devised and bequeathed to Mrs. Kellar vested as of the date of testator's death and vested indefeasibly". The witness called for the defendant believed "That a vested title did vest in Mrs. Kellar at the time of testator's death, but that it was not an indefeasible title".

Chief Judge Mickelson concluded that the rule in South Dakota (like that provided by statute in Missouri, § 473.260 set out *infra*), is:

> "The rule in South Dakota is that title to property both real and personal, passes immediately to the heirs and beneficiaries upon the death of the intestate or testator, subject only to the control of the County Court for the purpose of administration, and a decree of distribution vests or grants no title, but merely releases the property from probate and confirms the title already passed to the heirs or beneficiaries."

Judge Mickelson believed that there was uncertainty and indefiniteness in the provisions of the will and said:

> "I can reach no other conclusion but that the wording of Mr. Kellar's will is ambiguous, and that, while a court in construing such a will must try to determine the intention of the testator from the face of the will itself, looking to the four corners thereof, this will must be construed and the ambiguities determined by not only looking to the face of the will to determine the intention of the testator, but also by looking to the circumstances involved."

After a very careful and conscientious review of all the evidence and of the statutory and case law of South Dakota,

and many authorities on both sides of the question, the court came to the conclusion that:

> "It is my opinion that under the wills-and-property law of South Dakota, the language used by Chambers Kellar in his will, and the intention and the circumstances involved, would be regarded as having had the legal effect of vesting and making indefeasible in the widow, as of the time of the testator's death, *the property devised and bequeathed to her.*" (Emphasis supplied).

Having briefly reviewed how the courts of other jurisdictions have viewed the question, we come now to the question of how the Missouri courts construe the language in Lamar's will. No Missouri case has been cited which squarely meets the problem with which we are confronted. Most of the cases arise where the questions for determination are the rights of the residuary legatees, devisees or heirs of the decedent where the spouse predeceased the testator.

> "The law favors vested estates and the rule is that estates shall be held to vest at the earliest possible period, unless contrary intention is clearly manifested in the grant." *Trautz* v. *Lemp*, 46 S.W.2d 135, 142 (Mo. 1932).

This case clearly expresses the view of the Missouri courts on the question of early vesting. While the issue involved the question of when title vested in a trustee under a will, the principle is comparable. In that case the will provided:

> "All the rest, residue and remainder of my estate, of whatsoever kind and wherever situated, real, personal or mixed, I devise and bequeath unto my son Eugene W. Handlan, and my son Alexander H. Handlan, Jr., and my son E. R. Handlan, in trust, however, upon

the following uses, trusts and conditions, that is to say: (a) This trust is to commence immediately upon the termination of the administration of my estate, which must be accomplished within the statutory period, unless for good and sufficient reasons determined by the Probate Court having jurisdiction over the administration of said estate, it becomes impossible or impracticable to close the administration within such statutory period. This trust is to continue for a period of twenty (20) years from its beginning. * * *"

Continuing the Court said:

"Contention is made that under the terms of the trust there was a period of lapse between the time of testator's death and the vesting of the legal title in the trustees, the necessary effect of which was to transgress the rule against perpetuities."

In passing upon the question, the court stated:

"The words *devise* and *bequeath*, used by the testator in leaving the residue of his property to his three sons in trust, are not words of futurity, but on the contrary they import a present vesting of the legal title in the trustees immediately upon the death of the testator. There is no language in the will evincing a contrary intent unless it be the provision that the trust is to commence immediately upon the *termination of the administration of the estate in the probate court.*

The contention is that the legal title cannot vest in the trustees until the trust commences, and, as the will provides that the trust shall commence when the administration ends, necessarily the legal title will vest in the trustees at that time. This contention cannot be upheld for two reasons: (1) It is opposed to the rules of law governing the creation of trusts; and (2) it is contrary to the intention of the testator as expressed in his will." (Emphasis supplied).

Not only is this the general rule, but likewise the statutory law, § 473.260 V.A.M.S. The above section was § 84 of the Model Probate Code of Missouri, enacted in 1955 and provided:

> "When a person dies, his real and personal property, except exempt property, passes to the persons to whom it is devised by his last will, or in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it is subject to the possession of the executor or administrator and to the election of the surviving spouse and is chargeable with the expense of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this law."

It will be observed that the case law and the statutory law of Missouri conform almost identically to the law of South Dakota cited by Judge Mickelson in *Kellar* v. *Kasper*, *supra*. It is also the rule in Missouri that the:

> "unconditional devise of the fee * * * can be cut down only by an express declaration to that effect or by the use of language necessarily implying such a purpose from words equally as clear as those creating the fee." *Schacke* v. *Siem*, 265 S.W.2d 338, 341 (Mo. 1954); *Thompson* v. *Smith*, 300 S.W.2d 404 (Mo. 1957).

The tax is on the act of the testator and is admeasured as it stood on the day when the testator died. *First Trust Co. of St. Paul* v. *Reynolds*, 137 F.2d 518, 521 (C.A. 8th, 1943); *Sheed's Estate* v. *Commissioner of Internal Revenue*, 237 F.2d 345 (C.A. 9th, 1956).

The true intent and meaning of a testator must be determined from the entire instrument, and must be enforced unless it conflicts with public policy or positive law. *Schacke* v. *Siem*, *supra*. What was the testator's intent so far as his wife was concerned? Certainly it was that she was to have the remainder of his estate with no restriction

so far as she was concerned. Paragraph 1, Article X of the will which provides:

> "I give, devise and bequeath all of the rest, residue and remainder of my property and estate, of whatsoever character and description, real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife, Maude H. Lamar, to have and to hold as her property *absolutely*." (Emphasis supplied).

vests the property in the wife absolutely. She is not required to do anything, nor is she prohibited from doing any act that could defeat her right to the bequest. There was no limitation upon her right to receive and enjoy the bequest. Under the will it certainly was his intention that upon his death it should be hers, and under the statute § 473.260 *supra*, which became a part of the will, the bequest vested upon his death. There was no expressed intent to limit her right to it or to dispose of it. No earthly power could defeat her "absolute" right to the bequest. Only an act of God, death, could defeat it.

The second paragraph:

> "In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall not survive me or in the event she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, or *shall not survive the administration of my estate*, then and in that event, I give, devise and bequeath and dispose of said residue and remainder of my property to the following persons and in the manner as follows: * * *" (Emphasis supplied).

does not seek, nor can it be construed, it seems to me, to limit or defeat her rights, but it is a limitation upon the right of his heirs to ever inherit or take by bequest what he left at the time of his death. If that construction can-

not be placed upon it, then paragraph 2 is inconsistent with paragraph 1 which makes the bequest "absolute".

As heretofore stated, there was no real estate and no debts of consequence, and under § 473.613 V.A.M.S. there being an adequate amount of money to pay the costs of administration and the debts (there was here more than $600,000), the executrix could, at any semi-annual settlement, have made a partial distribution to the beneficiaries.

Because of its comparative newness, I have not been able to find any case in Missouri construing the provisions of § 473.260 providing for the vesting of property upon the death of a testator. Surely when Congress enacted legislation to equalize the tax burden between community and non-community property states, it did not anticipate that it would be so narrowly construed as to defeat its purpose.

Considering the language of the will, the apparent conflict between paragraphs 1 and 2 of Article X, the rule of early vesting, the intent of the testator, and the general and statutory laws of Missouri, it is my conclusion that the bequest vested in the widow at the time of testator's death and that the estate is entitled to the marital allowance.

Richard M. Duncan
Judge

Dated: December 3, 1962.

Form of Judgment Entry in accordance herewith, may be submitted within ten days hereof.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,337

Edwin O. Bookwalter, District Director of Internal Revenue,
Appellant,
v.
Maude H. Lamar, Personally and as Executrix of the Estate of Frederick C. Lamar, Deceased,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[October 28, 1963.]

Before MATTHES and MEHAFFY, Circuit Judges, and MICKELSON, District Judge.

MATTHES, Circuit Judge.

The basic issue in this case is whether Maude H. Lamar (appellee), widow of Frederick C. Lamar, deceased, is entitled to the "marital deduction" of 50% of the value of the adjusted gross estate of Mr. Lamar under the provisions of § 2056 of the Internal Revenue Code of 1954. More precisely, was the interest in the estate devised to the widow by decedent in his last will and testament a terminable one within the meaning of the statute, so as to disqualify her from claiming the "marital deduction,"—as contended by the Director, or, did the devised property vest absolutely in the widow immediately upon Lamar's death, free of any contingency—as urged by appellee and as found by the trial court? *Lamar* v. *Bookwalter*, W.D. Mo., 213 F.Supp. 860 (1962).

Section 2056 of the Internal Revenue Code of 1954, the statutory authority for the "marital deduction," also provides for a limitation in the case of a life estate or other terminable interest. Pertinent hereto is that portion of the limitation which reads:

> "(b) Limitation in the case of life estate or other terminable interest.—
>
> "(1) General rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—
>
> "(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
>
> "(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;"

The facts were agreed upon and in summary are as follows:

Lamar, the testator, a resident of Kansas City, Missouri, died on January 1, 1958, survived by his widow, a son, a daughter-in-law, and a number of grandchildren. His will, executed on April 13, 1954, provided for a number of specific bequests not here in issue. The controversy is focused upon and revolves around Article Ten of the will, particularly the first two paragraphs of Article Ten, which read:

"I give, devise and bequeath all of the rest, residue and remainder of my property and estate, of whatsoever character and description, real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife, Maude H. Lamar, to have and to hold as her property absolutely.

"In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall not survive me or in the event she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, *or shall not survive the administration of my estate*, then and in that event, I give, devise and bequeath and dispose of said residue and remainder of my property to the following persons and in the manner as follows:" (Emphasis supplied).

In the nine succeeding paragraphs of Article Ten, the testator, in explicit language, provided for disposition of "the rest, residue and remainder" of his property in the event of the occurrence of any of the enumerated contingencies. Since Mrs. Lamar survived her husband and the administration of his estate, the "gift-over" provisions of the will did not become operative.

The will was admitted to probate in the Jackson County, Missouri Probate Court on January 8, 1958, the estate was duly administered, and the finding and order discharging the designated executrix—Maude H. Lamar—was entered by the probate court on April 1, 1959. As executrix, Maude H. Lamar executed and filed the federal estate tax return on November 26, 1958, and simultaneously with such filing paid the tax liability shown thereon to be due in the amount of $59,462.43. After audit of the return, the Government disallowed the claimed "marital deduction" in the amount of $223,907.31, and on September 9, 1960, levied a $70,456.89 deficiency assessment against

appellee in her capacity as executrix. Appellee paid the assessment on September 19, 1960, and her claim for refund forms the basis for this action.

It is manifest from the trial court's opinion that the first paragraph of Article Ten of the will greatly influenced the court in its ultimate conclusion. Looking to that paragraph, the court stated:

> "She [the widow] is not required to do anything, nor is she prohibited from doing any act that could defeat her right to the bequest. There was no limitation upon her right to receive and enjoy the bequest. Under the will it certainly was his intention that upon his death it should be hers, and under the statute, § 473.260 supra, which became a part of the will, the bequest vested upon his death. There was no expressed intent to limit her right to it or to dispose of it. No earthly power could defeat her 'absolute' right to the bequest. Only an act of God, death, could defeat it." 213 F.Supp. at 867.

While the court did not find any ambiguity in the phrase "or shall not survive the administration of my estate" appearing in the second paragraph of Article Ten, the court held in effect that the phrase was meaningless, reasoning that it did not

> "limit or defeat her rights, but it is a limitation upon the rights of his heirs to ever inherit or take by bequest what he left at the time of his death. If that construction cannot be placed upon it, then paragraph 2 is inconsistent with paragraph 1 which makes the bequest 'absolute.'" 213 F.Supp. at 867.

Opposed to the court's interpretation of the crucial clauses of the will, the Director, in summary, contends that the devise to the widow in the first paragraph of Article Ten was expressly conditioned upon the occurrence of an event or contingency, or on the failure of an

event or contingency to occur, together with a limitation and "gift-over" of the same property to testator's son, daughter-in-law and grandchildren; that upon the death of testator it was not certain or definite that the widow would survive the administration of the estate; that therefore her interest in the property was a defeasible or terminable one within the meaning of § 2056(b)(1); and thus that the "marital deduction" was not allowable.

Appellee expressly concedes that "(f)or Federal estate purposes an interest passing to a surviving spouse to qualify for the marital deduction, must be absolute and indefeasible"; that "(s)uch a determination, under state law, must be made as of the moment of the testator's death." She makes no claim of ambiguity in the second paragraph of the will, but takes the unequivocal and unyielding position that, inasmuch as paragraph 1 of Article Ten conveyed the residue of Lamar's estate to the widow *absolutely*, paragraph 2 and particularly the clause "or shall not survive the administration of my estate" not only did not render the prior grant defeasible and her interest in the property terminable, but that such clause was utterly meaningless. In appellee's language, "It is comparable to the tail of a dog. It's there but it does not change the substance of the animal, and may be removed without trouble, since it serves no purpose other than appearance. The questioned clause is null and void and of no effect."

Clearly, the crux of this controversy centers upon the nature, extent and character of the interest under Missouri law which passed to decedent's widow under his will at the precise moment of his death. See *United States* v. *Quivey*, 8 Cir., 292 F.2d 252, 255 (1961); *United States* v. *Mappes*, 10 Cir., 318 F.2d 508, 510-511 (1963); *Cunha's Estate* v. *C.I.R.*, 9 Cir., 279 F.2d 292, 297 (1960), cert. de-

nied, 364 U.S. 942 (1961). If such interest was defeasible, then under § 2056(b)(1) of the 1954 Internal Revenue Code, the interest was "terminable," and the widow was not entitled to a "marital deduction." In construing the will—the key issue to be resolved, we are admonished to follow the applicable Missouri statutes as interpreted by the Supreme Court of Missouri, and as embodied in the jurisprudence of that state. See *Kasper* v. *Kellar*, 8 Cir., 217 F.2d 744 (1954); *Yocum* v. *Parker*, 8 Cir., 134 Fed. 205, 211 (1904).

According to the statutory law of Missouri, "[a]ll courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." V.A.M.S. § 474.430. Such true intent is the keystone of construction in ascertaining the meaning of any will, and must be gleaned from examination of the *entire* instrument, viewing it from its four corners. When the real intent of the testator is determined, the proper construction of the will is accomplished. E. g. *Shaw* v. *Wertz*, 369 S.W.2d 215, 217 (1963); *Thompson* v. *Smith*, 300 S.W.2d 404, 406 (1957); *Housman* v. *Lewellen*, 362 Mo. 759, 244 S.W.2d 21, 23 (1951); *Vaughan* v. *Compton*, 361 Mo. 467, 235 S.W.2d 328, 330 (1950); *Blumer* v. *Gillespie*, 338 Mo. 1113, 93 S.W.2d 939, 940 (1936); *Cox* v. *Jones*, 229 Mo. 53, 129 S.W. 495, 497-498 (1910). All technical rules of construction are subservient to the paramount rule that the intention of the testator shall control unless it contravenes some established rule of law. *Commerce Trust Company* v. *Weed*, 318 S.W.2d 289, 294 (1958). Considering the Missouri law pertinent to will construction in *Brittain* v. *First Trust & Savings Bank*, 8 Cir., 42 F.2d 613 (1930), cert. denied sub nom. *Motter* v. *Brittain*, 282 U.S. 896 (1931), we observed:

"The cardinal rule in the construction of wills is to ascertain the intent of the testator. This intent is to be determined from the whole will and from a consideration of all of its provisions; and it is to be presumed that every word is intended by the testator to have some meaning; and no clause is to be rejected to which a reasonable effect can be given; and where two constructions are possible, one disregarding the word or clause, and the other giving it effect, the latter should be adopted." 342 F.2d at 615.

See also, *Burnes* v. *Burnes*, 8 Cir., 137 Fed. 781, 792 (1905), cert. denied, 199 U.S. 605 (1905).

Other principles of will construction—all of which are more or less hornbook law, are cited and discussed by both parties. It would indeed be excess exposition to repeat such commonplaces of the law about which there can be little or no question. Here we shall mention only those principles which we deem particularly relevant.

On the one hand, appellee strongly relies upon the rule that the law favors the early vesting of testamentary estates, so that if an intention to the contrary does not *clearly* appear, an interest will *always* be construed as vested rather than contingent. E.g. *Uphaus* v. *Uphaus*, 315 S.W.2d 801 (1958); *McDougal* v. *McDougal*, 279 S.W.2d 731 (1955); *Bolles* v. *Boatmen's National Bank of St. Louis*, 363 Mo. 949, 255 S.W.2d 725 (1953); *St. Louis Union Trust Co.* v. *Herf*, 361 Mo. 548, 235 S.W.2d 241 (1951). See also, *Blackhurst* v. *Johnson*, 8 Cir., 72 F.2d 644, 647 (1934). As a corollary, appellee correctly states that the devise of a fee in terms, or by words necessarily describing an *absolute* estate, cannot be annulled except by language in the will, which expressly or by necessary implication arising from words equally clear and conclusive as those devising the fee, cuts down the previous devise of the fee. E.g. *Thompson* v. *Smith*, supra, 300

S.W.2d 404; *Housman* v. *Lewellen*, supra, 244 S.W.2d 21; *Vaughan* v. *Compton*, supra, 235 S.W.2d 328.

> "The intention to create an estate subject to a condition or qualification 'must be definitely and clearly shown by the use of apt and sufficient words not inconsistent with the other words of the instrument.'" 235 S.W.2d at 331.

The Director asserts that a clause in a will which standing alone constitutes an "absolute" devise, can be limited by a subsequent clause, containing express, unambiguous language of equal force, clearness and strength as that used in the prior grant of the absolute title. E.g. *Sorenson* v. *Booram*, 317 Mo. 516, 297 S.W. 70, 71 (1927); *Cox* v. *Jones*, supra, 129 S.W. 495, 498, 499. And ". . . the antecedent *position* of a clause in a will alone does not make it override subsequent clauses" because "[t]the intention of the testator must be ascertained from the will as a whole." *Moran* v. *Sutter*, 360 Mo. 304, 228 S.W.2d 682, 689 (1950).

We are also cited, pro and con, to a vast array of decisions, some from jurisdictions other than Missouri, and only a few of which deal with wills even remotely resembling the will here in question. Compare, for example, *Shedd's Estate* v. *Commissioner of Internal Revenue*, 9 Cir., 237 F.2d 345 (1956), cert. denied, 352 U.S. 1024 (1957); *Farrell* v. *United States*, S.D. Cal., 198 F.Supp. 461 (1961); *Sorenson* v. *Booram*, supra, 297 S.W. 70; *Burnet* v. *Burnet*, 244 Mo. 491, 148 S.W. 872 (1912); *Dameron* v. *Lanyon*, 234 Mo. 627, 138 S.W. 1 (1911); *Cox* v. *Jones*, supra, 129 S.W. 495, with *Steele* v. *United States*, D. Mont., 146 F.Supp. 316 (1956); *Shaw* v. *Wertz*, supra, 369 S.W.2d 215; *Gehring* v. *Henry*, 332 S.W.2d 873 (1960); *Thompson* v. *Smith*, *supra*, 300 S.W.2d 404; *Schacke* v. *Siem*, Mo.Sup., 265 S.W.2d 338 (1954); *Housman* v.

Lewellen, supra, 244 S.W.2d 21; *Vaughan* v. *Compton*, supra, 235 S.W.2d 328; and *Bowles* v. *Shocklee*, Mo.Sup., 276 S.W. 17 (1925). Although most of these cases are in varying degrees pertinent, by reason of the infinite variety of expression employed in wills, precedents are of less value in their construction than in any other field of inquiry. Even identical words justly receive different interpretations when set in variant contexts and used under different circumstances. *Thompson* v. *Smith*, supra, 300 S.W.2d at 406; *Housman* v. *Lewellen*, supra, 244 S.W.2d at 23; *Moran* v. *Sutter*, supra, 228 S.W.2d at 689.

With the foregoing rules and decisions in mind, we approach the construction of the will in controversy.

Standing alone, the first paragraph of Article Ten would unquestionably give Maude H. Lamar an *absolute* and *unconditional* title in the residue of her deceased husband's estate. Immediately following the first paragraph, however, and also within Article Ten, there are ten additional paragraphs under which the same property is granted to designated members of decedent's family in the event that Maude H. Lamar would either (a) die prior to the testator; (b) die simultaneously with the testator or as the result of a common accident or calamity; or (c) not survive the administration of testator's estate. As previously indicated, it is well settled in Missouri that "the devise of a fee in terms, or by words necessarily describing an absolute estate, cannot be annulled *except* by later language in the will which expressly or by necessary implication, arising from words equally clear and conclusive as those in devising the fee, cuts down the previous devise of the fee." And this rule has been recognized as applicable wherein the first devise was "absolutely and in fee simple." See the discussion of the rule in *Thompson* v. *Smith*, supra, 300 S.W.2d at 405-406.

citing Housman v. *Lewellen*, supra, 244 S.W.2d 21, and *Vaughan* v. *Compton*, supra, 235 S.W.2d 328. Accordingly, if the contingency and limitation that "[i]n the event . . . my wife . . . shall not survive the administration of my estate," plus the "gift-over" to designated persons in that event, is at least as clear and unambiguous as the devise to decedent's surviving spouse in the first paragraph, then the previous devise is made subject to the contingency, is a "terminable interest" within the meaning of § 2056(b)(1), and appellee is not entitled to the "marital deduction."

The phrase "administration of my estate" is unambiguous, and its meaning is firmly established in Missouri. *State ex rel. Knisely* v. *Holtcamp*, 266 Mo. 347, 181 S.W. 1007, 1010-1011 (1915); *State ex rel. Lefholz* v. *McCracken*, 231 Mo.App. 870, 95 S.W.2d 1239, 1241-1242 (1936). See also, *United States* v. *Mappes*, supra, 318 F.2d at 512. It is undisputed that administration of the estate was mandatory; the day of final administration was a day certain even though unascertainable at the precise moment of decedent's death; and it was problematical whether Maude H. Lamar would be living at the date of final administration. Cf. *United States* v. *Quivey*, *supra*, 292 F.2d at 255. Examination of Article Ten in the context of the entire will clearly reveals that decedent explicitly and unmistakably intended and provided that if his wife failed to survive the administration of his estate, her interest would terminate. With the same precision and clarity, decedent expressly provided for the devolution of the residue in the event that this contingency occurred.

Of course, merely because decedent's wife was in fact alive on the date of final administration and the "gift-over" provisions thus were inoperative, does not change the nature, character and extent of the interest which passed to decedent's wife at the precise moment of his death. We

cannot wait, like "Monday morning quarterbacks," to see what actually happened but must concern ourselves with what *could* have happened. See *Kasper* v. *Kellar*, supra, 217 F.2d at 746; *United States* v. *Mappes*, supra, 318 F.2d at 511; *Shedd's Estate* v. *Commissioner of Internal Revenue*, supra, 237 F.2d at 349.

Certainly, the contingencies that the testator imposed upon the devise to his wife were expressed in language equally as clear and strong as the prior devise of the interest itself. Furthermore—in contrast to many of the cases cited by appellee wherein the conflict was life estate v. fee simple—here the limiting language, rather than being irreconcilably inconsistent with the prior devise, actually evidenced an overall intention and plan to give a fee to testator's wife subject to certain contingencies which could in time be rendered inoperative.

Reverting again to the trial court's opinion, it appears that the court, being of the view that Missouri cases do not authoritatively settle the question, was strongly persuaded by its interpretation of *Kasper* v. *Kellar*, supra, 217 F.2d 744, on remand 138 F.Supp. 738 (D.S.D. 1956). In *Kasper*, we remanded the case to enable the district court to determine whether, under South Dakota law, the property "*rested indefeasibly*" in the widow to whom it was devised and bequeathed, as of the time of the testator's death. 217 F.2d at 748.[1] Upon remand, the district court heard and considered expert testimony of outstanding members of the bar of South Dakota, carefully

1. In *Kasper* as here, the question was whether the widow was entitled to a "marital deduction". Typical of the disputed portions of the Kellar will is the following language: "If either my wife or my son dies prior to the distribution of my estate I give, devise and bequeath all of said rest, residue and remainder of my property and estate to the survivor of them: . . ."

analyzed the questioned portions of the will in light of South Dakota law, and reached the conclusion that, ". . . under the wills-and-property law of South Dakota, the language used by Chambers Kellar in his will, and the intention and the circumstances involved, would be regarded as having had the legal effect of vesting and making undefeasible in the widow, as of the time of the testator's death, the property devised and bequeathed to her." 138 F.Supp. at 744. In our considered view, *Kasper* is distinguishable, principally because the district court there found that the clause "if living at the time of the distribution of my estate" was ambiguous and was susceptible to one of four different meanings. Apparently it was this ambiguity which was responsible in part at least for the hearing of expert testimony as to the meaning of the will, it being well settled that extrinsic evidence of that nature is ordinarily inadmissible.

Here, the trial court also regarded § 473.260, V.A.M.S.,[2] as supporting its conclusion that under the Lamar will the interest granted to the widow vested indefeasibly immediately upon testator's death. True it is that under the statute both personalty and realty pass to the persons to whom devised—or, in case of intestacy, to the heirs—*upon the death of the owner*, subject to the conditions enumerated in the statute.[3] But this codification of the

---

2. § 473.260, V.A.M.S., provides: "When a person dies, his real and personal property, except exempt property, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it is subject to the possession of the executor or administrator and to the election of the surviving spouse and is chargeable with the expenses of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this law."

3. For a discussion of the purpose of the statute, see William F. Fratcher, Trusts and Successsion in Missouri, 27 Mo.L.Rev.

law in regard to devolution of the decedent's property is of no assistance in determining the *nature* or *quantum* of the interest in the property which passes upon the decedent's death.

The facts and circumstances in *United States* v. *Mappes*, supra, 318 F.2d 508, reversing 208 F.Supp. 42 (W.D. Okla. 1962),[4] where the issue was also whether a widow was entitled to a "marital deduction," are remarkably similar to those of the instant case. While *Mappes* is not controlling because the court was there concerned with the construction of a will under Oklahoma law, it is nevertheless persuasive authority for the proposition that the interest of Mrs. Lamar in the property devised and bequeathed to her was defeasible and terminable and not subject to qualification for the "marital deduction." Insofar as is here material, the *Mappes* will provided:

> "I give, devise and bequeath to my wife, Lottie Mappes, if living at the time of my death, all of the remainder of my property, real, personal and mixed, wherever it may be situated."

In the next paragraph, this provision appears:

> "In the event that my wife should predecease me, *or should die before my estate has been administered*, then and in that event I give, devise and bequeath to my sons, . . . all the remainder of my property. . . ." (Emphasis supplied).

93, 109-110 (1962); Edward D. Summers, Revisor of Statutes, Introduction to 1955 Missouri Probate Code, Pamphlet—Vernon's Annotated Missouri Statutes, p. X.

4. The opinion of the trial court herein, while recognizing and considering the opinion of the United States District Court in *Mappes* v. *United States*, was filed prior to the decision of the court of appeals in *United States* v. *Mappes*, which, as noted, reversed the district court.

The Tenth Circuit, in a soundly reasoned opinion, demonstrated the distinguishable features of *Kasper* v. *Kellar*, supra, 217 F.2d 744, on remand 138 F.Supp. 738, noted that in the instant case the trial court construed the conditional words of the Lamar will as a limitation upon the rights of the heirs to inherit or take under the will what the testator left at the time of his death, and reached the conclusion that "the critical language of our will [Mappes] purports to limit or condition the right of the spouse to take the property, even though it may also impose a limitation upon the rights of the sons to inherit. This language is, to be sure, inconsistent with the absolute devisement, but it is not irreconcilably so." 318 F.2d at 513.

We have carefully considered appellee's argument in her futile attempt to distinguish *Mappes* and to completely discount the force of the opinion. While, as noted, *Mappes* is not controlling, it cannot be gainsaid that the language in the *Mappes* will "or should die before my estate has been administered", is almost identical to the critical phrase around which the controversy herein is centered. We are satisfied that the construction of such language by the Tenth Circuit in the *Mappes* will is in harmony with the canons and rules of construction as enunciated by the Missouri courts.

In summary, we hold that the right of the widow to take the residue and remainder of testator's estate was conditioned by plain, clear and unambiguous language upon her surviving the administration of the estate, and that the conditional disposition created a "terminable interest" within the meaning of § 2056 of the 1954 Code, thereby defeating her right to the "marital deduction."

Judgment reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,339

E. O. Bookwalter, District Director of Internal Revenue,

Appellant,

v.

Marie Phelps, Executrix of the Estate of Calvin N. Phelps, Deceased,

Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[December 11, 1963.]

Before VAN OOSTERHOUT and BLACKMUN, Circuit Judges, and DAVIES, District Judge.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by the District Director of Internal Revenue from final judgment entered against him in favor of estate taxpayer for refund of estate taxes erroneously assessed and paid. All jurisdictional requirements relating to the bringing of this action and the taking of this appeal have been met.

The issue presented by this appeal is whether the widow's allowance made by the probate court to the surviving spouse under Missouri law in the form of a lump sum award of $20,000, which in fact has been paid to the surviving spouse, qualifies for the marital deduction under § 2056 I. R. C. 1954. More specifically the issue is whether the Missouri widow's allowance here involved is

a terminable interest and hence not subject to the marital deduction.

The case was tried to the court without a jury. The court held the estate was entitled to a marital deduction upon the widow's allowance and entered judgment for the refund. The Government, as a basis for reversal, states:

> "Since a support allowance made by the probate court to the decedent's widow pursuant to the probate code of Missouri was conditioned upon her being alive at the time it was payable, it constitutes a terminable interest under Section 2056(b)(1) of the Internal Revenue Code of 1954, and therefore may not be included in the marital deduction for federal estate tax purposes."

Judge Oliver, in a memorandum opinion reported at 210 F. Supp. 801, rejects the Government's contention that the Missouri widow's allowance here involved is a terminable interest. He points out that Missouri adopted a new probate code in 1955 and that no Missouri interpretation has been made of the widow's allowance provision of the 1955 Code. Judge Oliver sets out the statutory law existing prior to the adoption of the 1955 Code and with respect to the interpretation of such earlier provisions states:

> "*Monahan* v. *Monahan's Estate*, (1936) 232 Mo. App. 91, 89 S.W.2d 153, 155, 156, construing the Missouri law as it stood before the enactment of the new Missouri Probate Code, held:
>
> '(O)ur courts, from a very early day, have with remarkable unanimity, held that * * * the money allowed * * * became the absolute property of the surviving widow or widower, as the case may be, free from the claims of creditors or distributees or other beneficiaries of the estate. * * * (T)he right to an allowance out of the estate * * * inures in the surviving spouse.
>
> * * *

> "It is certain that under the established rule of decision in this state the widow's allowances are regarded as her absolute property, and not to be considered as assets of the estate.'" 210 F. Supp. 801, 802-03.

The parties to this appeal do not question the foregoing as being a proper statement of Missouri law as it existed prior to the enactment of the 1955 Code.

The court then sets out §§ 474.260 and 474.300, 26 V.A.M.S., which contain the new Code provisions relating to widow's allowances and carefully considers the legislative history of such statutes, the report of the Joint Probate Laws Revision Committee to the legislature, and Law Review articles written by persons closely associated with the probate law revision, and comments:

> "We are not at all sure that had we been sitting on a Missouri court we would have decided *Monahan* in the manner that it was decided. But we have no doubt about what a Missouri court did hold in *Monahan*. Nor do we have any doubt that no one connected with the drafting and passage of the new Probate Code ever dreamed that they were changing the rule of *Monahan*. We likewise are most doubtful that any Missouri court would hold that a single sentence in Section 474.300 was intended to and did in fact change the rule of *Monahan*. We are therefore required to find that the interest created by Section 474.260 is unaffected in substance by the language relating to that section in Section 474.300 and that the rule of decision announced in *Monahan* is still the law of Missouri, at least so far as the facts of this case involving a lump sum payment are concerned, and that plaintiff should prevail." 210 F. Supp. 801, 807.

It is well established that the nature and character of a widow's right to receive an allowance from the estate of her husband must be determined upon the basis of state

law. *Jackson* v. *United States*, 9 Cir., 317 F.2d 821; *United States* v. *Quirey*, 8 Cir., 292 F.2d 252; Rev. Rul. 83, 1953-1 Cum. Bull. 395.

We have often stated that we will accept the view of an experienced trial judge upon doubtful questions with respect to the law of his state unless we are convinced that the trial court's determination is based upon a clear misconception or misapplication of local law. *Venn* v. *Goedert*, 8 Cir., 319 F.2d 812, 814; *National Bank of Eastern Ark.* v. *General Mills, Inc.*, 8 Cir., 283 F.2d 574, 576-77; *Homolla* v. *Gluck*, 8 Cir., 248 F.2d 731, 734. This is because the power to establish state law and interpret state statutes rests in the highest court of the state and an able and experienced federal trial judge, residing in the state, by reason of his close association with the development of the law of the state is ordinarily in a better position to predict the course the appellate courts of his state will follow when and if the doubtful question is presented to it than is this court.

We are not here able to say that the trial court erroneously interpreted or applied the law with respect to the survival of widows' allowances upon the death of the widow. The Government places considerable reliance upon our decision in *Quirey*, supra. Many distinctions exist between our present case and *Quirey*. We are here considering Missouri law, not Nebraska law. The Missouri statutes differ materially from the Nebraska statutes. In *Quirey*, we based our holding that the widow's allowance was a terminable interest upon decisions of the Nebraska Supreme Court interpreting Nebraska statutes. No comparable Missouri case law here exists.

Schubel v. *Bonacker*, Mo., 331 S.W.2d 552, relied upon by the Government, does not compel a reversal here. *Schubel* dealt exclusively with homestead rights. Home-

stead is one of three rights allowed a surviving spouse in Missouri and is afforded by § 474.290, V.A.M.S. Section 474.250 provides for the right of absolute property, and § 474.260 provides for the family allowance. Such rights are separate and distinct and are governed by separate statutes. The court, in its opinion in *Schubel*, observes that the new homestead statute is in lieu of dower and former homestead rights and that neither of such rights under prior law survived the death of the surviving spouse. *Schubel* does not deal with the widow's allowance situation and is not persuasive authority with respect to the widow's allowance situation. See *Estate of Gardner v. United States*, E.D. Mo., 220 F. Supp. 196, 198.

The trial court in reaching its decision in our present case gave full consideration to all of the issues urged by the Government on this appeal. The court in its well-considered opinion marshals all material bearing upon the legislative intent and carefully analyzes and considers all such material. Such material strongly supports the trial court's conclusion. The Government has failed to demonstrate that the trial court misinterpreted or misapplied Missouri law in reaching its decision that under Missouri law the statutory allowance for the surviving spouse is not a terminable interest.

Additional support for the trial court's opinion upon the disputed issue of state law here exists. *Estate of Oliver B. Avery*, 40 T.C. . . . (No. 45) involved a lump sum Missouri widow's allowance made and paid to the widow. The Tax Court followed Judge Oliver's interpretation of Missouri law, citing his opinion in the case now before us, and held the widow's allowance was not a terminable interest, stating:

> "In the present case the allowance was paid in a lump sum, there were no minor children, and there is

no provision in the Missouri statute authorizing a recovery by the estate of any part of the allowance in case of the early death of the widow. Cases involving installment allowances have no application. We conclude that the widow's allowance here was not a terminable interest. It is includable as a part of the marital deduction."

Judge Meredith, an able Missouri trial judge, was confronted with the problem here presented in *Estate of Gardner* v. *United States*, E.D. Mo., 220 F. Supp. 196. Judge Meredith discusses and approves Judge Oliver's interpretation of the Missouri widow's allowance statute and states, at p. 198:

"The Court finds that a spouse's allowance under the Missouri law is vested immediately on death. That it may be applied for after the death of the surviving spouse. It is not terminable on the happening of any contingency. It qualifies as a deduction under § 2056 of the Internal Revenue Code of 1954."

The judgment is affirmed.

BLACKMUN, Circuit Judge, dissenting.

I respectfully dissent. My concern is not so much with V.A.M.S. § 474.260 which authorizes a reasonable allowance for a surviving widow for her "maintenance during the period of one year after the death of the spouse" and which provides that that allowance "may be made payable in one payment or in periodic installments, and shall be made payable to the surviving spouse, if living, for the use of such surviving spouse * * *." If that statute were the only one before us, I might perhaps be persuaded, despite its "if living" condition, that this estate is entitled to a marital deduction for the allowance granted to Mrs. Phelps. That result would then be due to the interpretation the Saint Louis Court of Appeals gave the section's

different but nevertheless somewhat similar predecessors in the 1929 Revised Statutes. *Monahan v. Monahan's Estate*, 232 Mo. App. 91, 89 S.W.2d 153 (1936), and to the legislative history of this particular section so effectively employed by Judge Oliver in his opinion at 210 F. Supp. 801.

But we are not now to live with § 474.260 alone. We also have § 474.300. This is a new statute without predecessors. It first appeared in 1955 long after *Monahan* was decided. Its first sentence reads:

> "When a surviving spouse dies, * * * no allowance shall be made under section 474.260 for his maintenance for any period after such death * * *."

This language is clear, definite, and unambiguous. I think it is inescapable. It must and can only mean that if the surviving widow dies she is not entitled to allowance for any period after her death.

For purposes of the marital deduction the situation is to be viewed as of the date of the decedent's death (in this case, June 30, 1956), and not as of some subsequent date as, for example, when the probate court's maintenance order issues (in this case, October 3, 1956, "for the first year's support"). *United States* v. *Quivey*, 292 F.2d 252, 255 (8 Cir. 1961); *Bookwalter* v. *Lamar*, . . . F.2d . . . (8 Cir. 1963); *Cunha's Estate* v. *Commissioner*, 279 F.2d 292, 297 (8 Cir. 1960), cert. denied, 364 U.S. 942; *United States* v. *Mappes*, 318 F.2d 508, 510-11 (10 Cir. 1963). It would then appear necessarily to follow, from the language of the statute, that maintenance for Mrs. Phelps was contingent and dependent upon her continuing survivorship. In other words, her claim for maintenance was an interest terminable within the concept of § 2056(b)(1) of the Internal Revenue Code of 1954 and was not indefeasibly vested as of her husband's death. Being terminable, it

fails to qualify as a marital deduction. Whether the probate court's maintenance order called for periodic payments or for a lump sum is therefore of no consequence whatsoever.

But we are told (a) that the Missouri legislature, by its general revision of the state's probate laws in 1955, and hence by the specific enactment of § 474.300, did not intend to change the nature of the spouse's right to maintenance as it had been characterized in *Monahan*, and (b) that the district court's conclusion is a permissible one not to be disturbed on appeal.

For me the answer to the intent argument is the plain and unambiguous language of the first sentence of § 474.300. The intent argument is a negative one, namely that because commentators of the 1955 code, in mentioning proposed substantive changes, did not refer to § 474.300, the section therefore embraced no change. This does not convince me where language is so clear and so positive. I am fortified in this by the fact that § 474.300 was not part of the proposed probate revision presented to the legislature by the Revision Committee but, instead, "was inserted by legislative amendment". Consequently, comments on the code as proposed could not possibly be directed to § 474.300. I am further fortified by the recent decision of the Supreme Court of Missouri in *Schubel* v. *Bonacker*, 331 S.W.2d 552 (1960), a case not cited by the district court here. It is true that that case concerned the homestead allowance under § 474.290 rather than the family allowance under § 474.260. But the court there held that even the homestead allowance was not vested indefeasibly and automatically; in any event the case did concern certain aspects of § 474.300 and the court dwelt upon and emphasized historical background and purpose, pp. 554-55 of 331 S.W.2d. A similar emphasis on purpose of

the widow's allowance would bring into focus the condition of continuing survivorship. Also, I doubt if it is a question, as the district court has suggested, p. 805 of 210 F. Supp., whether the state legislature "intended fundamentally to change the nature of a widow's allowance from a non-terminable interest * * * to a terminable interest". It would seem that federal estate tax impact was not in the legislature's mind at all; if it had been, Missouri decedents' estates would surely have been clearly protected and the plain and self-defeating language of § 474.300 would not have been permitted and employed. The important and inescapable facts are that the section's first sentence exists and that it is unambiguous.

I fully appreciate the great caution which this court and its members, including myself, have exercised in diversity cases (which this is not) in upsetting the careful judgment of a federal trial judge upon a doubtful question of the law of his state. See *Village of Brooten v. Cuddihy Packing Co.*, 291 F.2d 284, 288-89, 301 (8 Cir. 1961); *Campbell v. Village of Silver Bay*, 315 F.2d 568, 575 (8 Cir. 1963). My concern is not alleviated by my awareness that a second Missouri federal district judge has now reached the same conclusion (although not mentioning § 474.300) on the issue before us, *Gardner's Estate v. United States*, 220 F. Supp. 196 (E.D. Mo. 1963), and that the Tax Court has done the same, *Estate of Oliver B. Avery*, 40 T.C. 392, 400-01 (1963). Each of these opinions, as I read them, relies upon and follows the decision of the trial court in the present case. This court has not hesitated, nevertheless, when occasion demands, to reverse a federal trial judge on a question of state law, if we have felt that his holding was improbable or less than "permissible". See, for example, *Massachusetts Bonding & Ins. Co. v. Julius Seidel Lumber Co.*, 279 F.2d 861, 869 (8 Cir. 1960); *Archer-Daniels-Midland Co. v. Paull*, 293 F.2d 389

397 (8 Cir. 1961); *L. C. Eddy Inc. v. City of Arkadelphia*, 303 F.2d 473 (8 Cir. 1962). And very recently this court, in another marital deduction case turning on Missouri law, where language of a will was "plain, clear and unambiguous", reversed the experienced Missouri federal judge who tried that case below. *Bookwalter v. Lanfar*, *supra*. We did exactly the same thing, too, although another state's law was involved, in *United States v. Quivey*, *supra*, 292 F.2d 252.

I am inclined to think that the trial court and the majority here are overly concerned with § 474.260, that they have overlooked or are under-concerned with § 474.360 and with its first sentence, and that they have rendered that sentence meaningless. We too readily avoid here the consequences of the specific terminable interest standard which conditions the marital deduction. After all, the burden of proof in this refund action is upon the taxpayer estate. *Industrial Aggregate Co. v. United States*, 284 F.2d 639, 644 (8 Cir. 1960), and cases cited; *English v. United States*, 270 F.2d 876, 879 (7 Cir. 1959). That burden, in my opinion, has not been met.

My personal dissatisfaction and distaste with making state law the criterion for terminability was set forth in my concurring opinion in *United States v. Quivey*, *supra*, p. 256 of 292 F.2d. See also, Chief Judge Chambers' concurrence in *Jackson v. United States*, 317 F.2d 821, 826 (9 Cir. 1963), certiorari granted, October 28, 1963. But if we must live with such a variable standard, then it seems to me that a plain statute ought to be given its plain meaning. If *Quivey* was right, and I think it was, this case is wrong. I would reverse.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.